

Key Initiatives Talking Points

Getting Washington Back to Work

Final 2004

Civil Liability Reform

"It's time to return 'justice' to the civil justice system."

Frivolous lawsuits and lottery-like judgments are driving up costs and jeopardizing access to health care and housing and putting people out of business and out of work.

Wildly unpredictable liability judgments affect everyone, from doctors and hospitals to patients; from state and local governments to taxpayers; and from grocery stores and construction companies to consumers.

In 2000, the jury award for medical malpractice rose 43 percent to \$1 million. By 2001, 52 percent of all awards exceeded \$1 million. In 2001, Washington's tort claim payout exceeded \$80 million.

Caps on non-economic damages are viewed by many as the most effective reform measure. According to the Congressional Budget Office, restrictions on tort liability reduce total awards and thus lead to lower premiums for malpractice insurance. In addition, a 2003 study found that between 1993 and 2002 restricting noneconomic damages and punitive damages together reduce premiums by more than one-third.

More than 40 states had at least one restriction on liability for malpractice injuries in effect in 2002. 18 states have modified the rules for awarding noneconomic damages. 38 states have modified the rule for joint and several liability.

The annual cost of America's tort system exceeds \$200 billion. Multi-family home construction in the Puget Sound region has dropped by more than a third over the last two years due to the lack of available and affordable liability insurance. This kind of market puts small contractors out of business.

According to the Washington State Medical Association (WSMA), medical malpractice insurance costs are having a growing impact on Washington's health care delivery system. Between 1998 and 2002, WSMA noted a 31 percent increase in the number of its physician members moving out of state. Many others are limiting their practices, especially in the high-risk areas like obstetrics and neurosurgery.

In 2001, Washington had seven medical malpractice verdicts or settlements ranging from \$1.2 million up to \$16.2 million and totaling \$44.7 million. This cost is passed on to health care providers and to patients – not only in the cost of health care, but in access to health care.

The Liability Reform Act of 2004 (ESSB 5728)

Part 1—Joint and Several Liability

Under current law, one party in a multi-party lawsuit can be found 10 percent responsible, but made to pay 100 percent of the judgment. ESSB 5728 replaces this “joint and several liability” rule with “proportionate liability.”

●Fair is fair! If someone is found 10 percent responsible for a reckless or negligent act, the obligation cannot be more than double or 20 percent. Lawyers should not be able to go after “deep pockets” to collect the most money possible. Responsibility and ability to pay are not the same thing.

A defendant can be held liable for 100 percent of the damages for intentional acts.

Part 2— Employer Reference Checks

Under current law, employers have no protection against lawsuits when they give honest, work-related information about a former employee during a reference check. Because of this, “bad performance reviews” can get buried and reference checks can be of little value.

●The Governor's 1998 Small Business Conference attendees identified the need for “good faith” immunity as their second-highest need. Employers need to be able to tell the truth without risking a lawsuit. Prospective employers deserve to know the work habits of those they hire.

Part 3—Tort Judgment Interest

Current law sets a ceiling of 12 percent on tort judgment interest rates when an appeal is lost. This old language was written in the 1970s as an attempt to cap then skyrocketing interest rates. Today, interest rates are much lower and 12 percent is no longer reasonable.

- We need a reality check. Times change, and the rules must too. ESSB 5728 ties interest rates to two percentage points above the Treasury Bill rate, which is currently a little more than 1 percent. This action was taken in SB 2485 and signed into law.

Part 4—Medical Malpractice

Current law places no cap on non-economic damages, allows the State Supreme Court to make exceptions to the mediation requirement and allows suits to be brought many years after the fact.

- Non-economic or “pain and suffering” awards are emotion-based and have no yardstick. The uncertainty of these payouts and the uncertainty over when a suit can be filed, substantially drives up the cost of liability insurance.

- ESSB 5728 caps non-economic damage awards at \$350,000, requires a 90-day notice of intent to file a suit, and limits the commencement of actions for adults to no more than three years unless there is proof of fraud. Children under the age of six may bring an action until their eighth birthday or within three years of the injury, whichever is longer.

Part 5—Construction Liability

SHB 2039 was signed into law last year, which encapsulates this section of ESSB 5728. This measure provides general construction liability relief through affirmative defenses.

- Claims by homeowners for valid construction defects are protected in this measure, while still reducing costly and unnecessary litigation.

Part 6—Seatbelt Defense

Under current law, juries are not allowed to know if a person hurt in a car accident was wearing a seatbelt or not — despite the fact that wearing a seatbelt is required by law and despite the fact that seatbelt use has been proven to reduce serious injuries and death.

●It's time to be fair. If the injured party was breaking the law and suffered compounded injuries as a result, the jury should know. ESSB 5728 simply allows this information to be entered into evidence.

Part 7—Government Liability

In the private sector, businesses pass the costs of being sued along to their customers in higher prices, or to their employees in job layoffs. But in government, taxpayers pay the bill in full.

From 1985 to 2000, the state tort claim payouts ranged from \$6 million to \$26 million. In 2001, the state's tort claim bill was over \$80 million.

●Under ESSB 5728, state and local governments are not liable for claims of over \$1 million or in the case of more than one claim arising out of a single incident, the cap is \$2 million.

Testified For: City and county government representatives, small business owners, WA State Residential Care Council, NFIB, AWB, AGC.

Testified Against: Trial Lawyers, crime victims groups, WA Collector's Assn.

Status: Passed the Senate 27-22, died in the House Judiciary Committee – the chairman prepared a striking amendment, but after testimony resoundingly in favor of the bill, chose instead to let the bill die in committee.

Note: The Doctors for Medical Liability Reform group is pushing tort reform at the federal level. Washington is one of two states with an active grassroots presence.

Congressional Action

Senate bill S. 2207 was introduced on March 12, 2004. Titled "Pregnancy and Trauma Care Access Protection Act of 2004."

The bill is described as: "A bill to improve women's access to health care services, and the access of all individuals to emergency and trauma care services, by reducing the excessive burden the liability system places on the delivery of such services." Very similar in concept to S. 2061, with the addition of trauma and emergency services. (U.S. Senate, 3/12/04) It was expected to come to the floor for a vote during the week of April 5, 2004.

On March 13, 2003, the U.S. House of Representatives approved the

Help Efficient, Accessible, Low Cost, Timely Health Care (HEALTH) Act of 2002 (H.R.5) by a vote of 229 to 196. This bill would place a \$250,000 limit on non-economic medical malpractice liability and limit attorney's fees.

Construction Liability Reform

The insurance industry is pulling out of the contractor liability market in Washington — new contractors are being refused coverage and those who already have coverage are finding renewals extremely costly, particularly those who build multi-family homes. The cost of this situation is the loss of affordable housing for Washington residents.

Resolving condominium construction claims (2ESSB 5536)

This measure limits implied warranties to defective materials, sound engineering, construction, workmanship, and compliance with all laws. Condo owners are responsible for showing the defect adversely impacted the performance of the condo and are awarded the cost of repairs or loss in market value of the condo, whichever is less.

Testified For: *Tacoma-Pierce, Seattle-King county Realtors, Realtors Assn., Home Sight, NFIB, King and Snohomish County Executives, Condominium Alliance, Master Builders, Assn. of King and Snohomish Counties, Bar Association, BIAW, Architects and Engineers Legislative Council, Contractors Bonding and Insurance Company*

Testified Against: 1000 Friends of Washington (with concerns), WA Homeowners Assn., Charter Construction Inc., WA Homeowners Coalition, Community Associations Institute, Community Assns. Institute, various homeowners' associations and attorneys

Status: Passed the Senate 49-0, passed House 97-0, signed into law

Revising construction liability (SSB 6600)

This measure clarifies that the 6-year statute of limitations for claims against contractors applies to persons who must be registered or licensed as architects, contractors, engineers, surveyors, landscape architects, or electricians.

Testified For: *AGC, Associated Builders and Contractors, National Electric Contractors, Mechanical Contractors*

Testified Against: *Trial Lawyers*

Status: Passed the Senate 48-0, passed House 83-13, signed into law

Limiting obesity lawsuits (SSB 6601)

This measure prevents liability lawsuits against restaurants for obesity or weight gain.

Testified For: Restaurant Assn.

Testified Against: Trial Lawyers

Status: Passed the Senate 48-0, passed House 95-1, signed into law

Democrat Package

Before session, House and Senate Democrats joined with the governor and insurance commissioner to propose a package of liability reform bills to counter Senate Republicans' comprehensive tort reform measure.

Ultimately, the House approved:

2EHB 1926 - This measure limits the use of expert witnesses by "each side." If multiple parties on the same side cannot agree on one expert for an issue, the court may allow more than one expert. (Passed House 56-42, died in Senate Rules.)

EHB 1927 - This measure provides a 90-day notice of intent to sue, but merely restates the mandatory mediation statute without closing the loophole that allows for exceptions. (Passed House 59-39, died in Senate Rules.)

ESHB 1928 - This measure eliminates the requirement that any entity causing a claimant's damages must be assigned a percentage of the total fault, eliminates a health care provider's joint liability for non-economic damages, and limits the liability of hospitals and health care providers for the acts or omissions of their agents. (Passed House 71-27, died in Senate Rules.)

HB 2485 - This measure ties interest rates to two percentage points above the Treasury Bill rate, which is currently a little more than 1 percent. (Passed Senate 43-3, passed House 70-27, signed into law)

ESHB 2779 - This measure limits employers' liability against lawsuits when they give honest, work-related information about a former employee during a reference check. (Passed House 51-45, died in Senate Rules.)

E2SHB 2786 - This measure creates an account to fund patient safety and medical error reduction efforts paid for with a small surcharge on

health professions licensing and a small portion of malpractice settlements and suits. The bill also authorizes hospitals to share information gathered from patient safety committees with other hospitals and medical groups so each institution can learn from the mistakes and experience of their peers, without fear of disclosure. (Passed House 78-20, died in Senate Ways and Means.)

ESHB 2787 - This measure provides immunity from liability for all licensed health care professionals performing volunteer health care services. (Passed Senate 49-0, Passed House 96-0, signed into law)

SHB 2788 - This measure broadens DOH's retired liability insurance to be offered to any volunteer serving low-income patients in a health care setting. (Passed House 88-10, passed Senate 49-0, signed into law)

ESHB 2816 - This measure requires a 90-day notice for cancellation of a medical malpractice liability insurance policy. (Passed House 98-0, died in Senate Rules.)

ESHB 2834 - This measure creates a task force on improvement of health professions discipline to conduct a review of the current process and make recommendations to the Legislature on how the system can be improved. (Passed House 87-11, died in Senate Rules.)

SHB 2837 - This measure requires all medical malpractice insurers to file their underwriting rules and standards with the insurance commissioner and limits the actions an insurer may take on a policy. (Passed House 98-0, died in Senate Financial Services, Insurance and Housing.)

EHB 2839 - This measure creates a task force to study alternatives for resolving health care injury disputes. (Passed House 82-16, died in Senate Rules.)

ESHB 2879 - This measure creates a course of action for sanctioned health care providers who refuse to follow through with their discipline. (Passed House 86-12, died in Senate Rules.)

SHB 2931 - This measure allows health professional boards and commissions to spend Health Professionals Account funds to support the profession and improve the disciplinary process. (Passed House 64-34, died in Senate Health and Long-Term Care.)

EHB 3197 - This measure requires medical malpractice insurers to report claims quarterly to the insurance commissioner. (Passed House 52-46, died in Senate Rules.)

EHB 3200 - This measure shortens the time period in which a medical malpractice claim can be filed. (Passed House 88-10, died in Senate Rules.)

EHB 3201 - This measure requires the court to award expenses and expert witness fees if a lawsuit is found to be frivolous. (Passed House 67-31, died in Senate Judiciary.)

Patient Safety

Patient safety is a vital part of the health care delivery system. Every day, doctors and other health care professionals make the best decisions they can with the information they have to ensure the health and safety of their patients. More mandates will not change that obligation to their patients and their profession, but it will drive up the cost and further compromise access to health care. Medical malpractice liability causes doctors to practice medicine defensively.

Nearly 80 percent of doctors say they order unnecessary tests and 74 percent say they make unnecessary referrals to specialists. The price is an estimated \$60 billion to \$108 billion a year in unnecessary health care costs.

One study found that malpractice reforms that directly reduce provider liability pressure lead to reductions of five to nine percent in medical expenditures without substantial effects on mortality or medical complications.